Supreme Court, U.S.
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Nos. 06-853 and 06-1014

In the

Supreme Court of the United States

CHEMTURA CANADA CO./CIE, fka CROMPTON CO./CIE, aka UNIROYAL CHEMICAL LIMITED,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding—contrary to the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits—that an entity that exercised no control over the disposal or treatment of hazardous substances, and had neither the authority nor the opportunity to control the disposal or treatment of hazardous substances, may nevertheless be held liable as one that "arranged for" the disposal or treatment of hazardous substances under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*

2. Whether retroactive application of § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*, to impose unforeseeable joint-and-several liability for over $110 million based on lawful, non-negligent conduct involving only about $1.5 million in transactions violates the Fifth Amendment to the United States Constitution.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari. Written consent was granted by the counsel for all parties and lodged with the Clerk of the Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation defending private property rights, economic freedom, and constitutional limitations. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF focuses particular attention to issues involving regulatory takings and the Fifth Amendment's protections afforded to private property rights. PLF attorneys represented property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). PLF attorneys have also written extensively on regulatory takings. *See, e.g.*, R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 Urb. Law. 437 (2006); J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 Fordham L. Rev. 1 (2002).

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[1] Pursuant to Supreme Court Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part. No person or entity, other than amicus curiae, made a monetary contribution specifically for the preparation or submission of this brief.

Because of its history and experience with regard to the Fifth Amendment's protections for private property, PLF believes its perspective will aid this Court in considering the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The essential question posed by the petition for writ of certiorari filed by Chemtura Canada Co. (hereinafter "Uniroyal") is whether, notwithstanding the Fifth Amendment's protections of private property, Congress may impose all manner of onerous obligations and duties, substantially and retroactively restricting property rights without any significant restraint from the federal constitution. The Eighth Circuit determined that the retroactive application of some $110 million in liability against Uniroyal pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) did not violate Uniroyal's rights under the Fifth Amendment. The court of appeal reasoned that this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), had no effect on the court's existing retroactivity jurisprudence.

That position is simply not tenable. At the very least, *Eastern Enterprises* stands for the proposition that a retroactive law violating both the three-factor standard enunciated in the *Eastern Enterprises* plurality opinion and the substantive due process test set forth in Justice Kennedy's concurrence violates the Fifth Amendment. The retroactive application of CERCLA to Uniroyal undoubtedly creates the same injustice that motivated a majority of this Court in *Eastern Enterprises* to invalidate the application of the Coal Industry Retiree Health Benefit Act (Coal Act) to Eastern Enterprises. Because the Eighth Circuit entirely ignored that fact, review by this Court is merited.

Review is also merited to clarify the precise holding of *Eastern Enterprises*. Both the courts of appeals and legal commentators have struggled with reconciling the conflicting rationales of the plurality opinion and Justice Kennedy's separate concurrence. The task is challenging because the three-factor analysis explicated by Justice O'Connor, and the due process analysis conducted by Justice Kennedy, are not perfectly commensurable. But that difficulty may be avoided altogether by this Court's adoption of the jurisprudential position that the controlling rationale is that which is sufficient to sustain the Court's judgment and is joined in by the majority of the Members of the Court concurring in the judgment. According to that criterion, the *Eastern Enterprises* plurality opinion controls.

ARGUMENT

I

THE EIGHTH CIRCUIT FAILED TO DETERMINE WHETHER THE RETROACTIVE APPLICATION OF $110 MILLION IN LIABILITY AGAINST UNIROYAL VIOLATES THE LATTER'S FIFTH AMENDMENT RIGHTS UNDER *EASTERN ENTERPRISES*

The panel below determined that CERCLA did not violate Uniroyal's Fifth Amendment rights. *United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1047-48 (8th Cir. 2006). The panel expressly followed *United States v. Dico, Inc.*, 266 F.3d 864 (8th Cir. 2001). In *Dico*, the Eighth Circuit held that *Eastern Enterprises* effected no change in this Court's existing retroactivity jurisprudence, and thus concluded that uncompensated retroactive application of CERCLA is constitutional. *Id.* at 880. The *Dico* court justified its holding in part on its position that: "no single Fifth Amendment rationale commanded a majority of the Court's votes in

Eastern." *Id. Dico*'s conclusion that *Eastern Enterprises* does not set forth a binding rationale is erroneous.

A correct interpretation of *Eastern Enterprises* requires an as-applied invalidation of a retroactive statute if retroactive application would violate the three-factor test of the *Eastern Enterprises* plurality as well as the substantive due process test set forth in Justice Kennedy's concurrence. In other words, a litigant who can show that CERCLA's application to it is substantially similar in nature and effect to the Coal Act's application to Eastern Enterprises, should be entitled, under the principles of stare decisis, to a holding of unconstitutionality. This Court has already intimated as much. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 174 (2003) (citing *Eastern Enterprises* for the proposition that the Coal's Act "severe retroactive liability on certain coal companies" violates the Constitution). And at least one court of appeals has so held. *See Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) ("*Eastern*, therefore, mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence.") (citing *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998)).[2]

Moreover, several commentators have interpreted *Eastern Enterprises* to have advanced and developed, to some degree, the Court's retroactivity jurisprudence. *See, e.g.*, Charles Tiefer, *Did* Eastern Enterprises *Send Enterprise Responsibility South?*, 51 Ala. L. Rev. 1305, 1325 (2000) (holding of *Eastern Enterprises* is that "highly aggravated" retroactivity violates the Fifth Amendment); Philip Jordan, Note, *Substantive Due Process Since* Eastern Enterprises, *With New Defenses Based*

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[2] *See also Mary Helen Coal Corp. v. Hudson*, 164 F.3d 624 (4th Cir. 1998) (table) (granting appellant summary reversal because the case was "materially indistinguishable from *Eastern*").

on Lack of Causative Nexus: The Superfund Example, 32 B.C. Envtl. Aff. L. Rev. 395, 404 (2005) (*Eastern Enterprises* imposes a causative nexus requirement between the liable actor and the harm); William L. Church, *The* Eastern Enterprises *Case: New Vigor for Judicial Review?*, 2000 Wis. L. Rev. 547, 565 ("For the five Justices voting against the Coal Act, there has to be a possibility that if the proper CERCLA case came before them, they would strike it down, too."); Karen S. Danahy, Comment, *CERCLA Retroactive Liability in the Aftermath of* Eastern Enterprises v. Apfel, 48 Buff. L. Rev. 509, 563 (2000) ("*Eastern Enterprises* will govern a challenge to retroactive legislation only if the specific parameters set forth by the Court can be established . . . [T]he law under scrutiny must impose a severely retroactive and disproportionate effect upon a claimant to enable a challenge to be successful."); Lisa R. Strauss, Note, *The Takings Clause as a Vehicle for Judicial Activism:* Eastern Enterprises v. Apfel *Presents a New Twist to Takings Analyses*, 16 Ga. St. U. L. Rev. 689, 728 (2000) ("While past challenges to CERCLA's constitutionality have failed, *Eastern Enterprises* opens the courthouse doors to plaintiffs who challenge the statute as applied because it declared the Coal Act's retroactive provisions unconstitutional as applied to Eastern Enterprises."); David Milton Whalin, *Is There Still Pre-1980 CERCLA Liability After* Eastern Enterprises*?*, 5 Envtl. L. 701, 720 (June 1999) ("One interpretation of *Eastern Enterprises* is that a majority of justices are willing to find that the retroactive application of a statute is impermissible when that statute reaches back beyond a particular point in time—in particular, the point before which a party had effective notice that future liability may attach to its actions."); Bruce Howard, *A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law*, 42 St. Louis U. L.J. 847, 863 (1998) ("[T]he decision in *Eastern Enterprises* makes it clear that courts must be prepared to find that in any given case the particular facts of CERCLA liability, if enforced against an

unfortunate party to the limits of the strict, joint, several and retroactive law, will run afoul of the takings and due process clauses of the Constitution.").

Thus, the Eighth Circuit was obligated to determine whether the takings and due process tests announced in *Eastern Enterprises* had been violated. The court of appeals did no such thing. A review of those tests reveals that the Eighth Circuit's omission was significant.

A. Retroactive CERCLA Liability Likely Constitutes a Taking Under the *Eastern Enterprises* Plurality Test

Writing for the *Eastern Enterprises* plurality, Justice O'Connor explained that the Court's retroactivity analysis should be conducted using the familiar three-factor test for regulatory takings announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Eastern Enterprises*, 524 U.S. at 529 (plurality opinion). Those factors are the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. *Id.* at 523-24.

Under the first factor, Uniroyal has suffered a severe economic impact by the retroactive application of CERCLA liability. As set forth in Uniroyal's petition, the expected liability is around $110 million. *See* Pet. at 19. That is greater than the estimated impact of the Coal Act on Eastern Enterprises, *see Eastern Enterprises*, 524 U.S. at 529 (plurality opinion) (estimating $50 to $100 million), which that case's plurality considered to be "a considerable financial burden." *Id.*

On the question of reasonable investment-backed expectations, the *Eastern Enterprises* plurality was impressed by the thirty to fifty year reach back of the Coal Act. *Id.* at 532. The plurality explained that such retroactivity, in combination with the federal government's varying involvement in the coal

industry, would not have given Eastern Enterprises sufficient notice that it would be liable in the future to provide guaranteed health benefits for former employees. *See id.* at 536. Here, although CERCLA's reach back is not as significant in terms of years, it is in terms of reasonable expectations. That conclusion follows for at least two reasons.

First, CERCLA contains no express retroactivity provision, *see United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 732 (8th Cir. 1986), and it is at least arguable that a reasonable person involved to some degree in the treatment or disposal of hazardous materials in the 1970s would not have expected the inchoate legislation that became CERCLA to be applied retroactively.[3]

Second, even assuming CERCLA retroactivity, a reasonable person in Uniroyal's position would not have expected CERCLA's "arranger" liability provision to have been construed as the Eighth Circuit did here, an expectation buttressed by the interpretations of several courts of appeals. Under Section 107(a) of CERCLA, an entity that "arranges" for the treatment or disposal of hazardous materials is liable for

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[3] *Cf. Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 25 n.3 (1st Cir. 1997) ("The insurance industry did not foresee the enactment of CERCLA's retroactive strict liability regime . . . ."); *United States v. Olin Corp.*, 927 F. Supp. 1502, 1519 (S.D. Ala. 1996) (holding that CERCLA Sections 106(a) and 107(a) are not retroactive), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); James A. King, *Kayser-Roth, Joslyn, and the Problem of Parent Corporation Liability Under CERCLA*, 25 Akron L. Rev. 123, 124 (1991) (noting that CERCLA's retroactive liability sent shockwaves through the banking and insurance markets); Jennifer R. Yelin (Student Article), *Retroactivity Revisited: A Critical Appraisal of CERCLA's Retroactive Liability Scheme in Light of* Landgraf v. USI Film Products *and* Eastern Enterprises v. Apfel, 8 N.Y.U. Envtl. L.J. 94, 120-36 (1999) (concluding that CERCLA should not be applied retroactively).

clean-up costs. Several courts of appeals have held that mere ownership of such materials, without active control over the same, cannot incur "arranger" liability. *See* Pet. at 8-14 (citing *inter alia*, *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992); *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669 (3d Cir. 2003); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000); *S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996), for the proposition that more than mere ownership is necessary to incur "arranger" liability under Section 107(a)). Given both the controversy over CERCLA's retroactive application, as well as the numerous courts of appeals decisions that decline to extend "arranger" liability to parties such as Uniroyal, it is fair to conclude that retroactive application of CERCLA would frustrate Uniroyal's reasonable investment-backed expectations, an important consideration to the *Eastern Enterprises* plurality.

Lastly, the character of the governmental action—retroactive liability running over a hundred million dollars for nonnegligent action—is at least as "unusual" as the retroactive application of liability to Eastern Enterprises. *See Eastern Enterprises*, 524 U.S. at 537 (plurality opinion).

B. Retroactive CERCLA Liability Likely Constitutes a Due Process Violation Under the Test Announced in Justice Kennedy's *Eastern Enterprises* Concurrence

Although Justice Kennedy did not accept the precise reasoning of the plurality, he did agree that the Coal Act as applied to Eastern Enterprises violated the Fifth Amendment. Justice Kennedy noted that the Coal Act's application to Eastern Enterprises was "arbitrary and beyond the legitimate authority of the Government to enact." *Eastern Enterprises*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part). He read the plurality opinion to establish convincingly that the Coal Act's remedy bore no legitimate

relationship to the proffered governmental interests. *Id.* at 549. Given the severe retroactive effect of the legislation on Eastern Enterprises, and given that the latter was in no way the proximate cause of the "resulting chaos" in miner-retiree health and pensions benefits which the Coal Act sought to ameliorate, the application of the Coal Act to Eastern Enterprises would violate due process. *Id.* at 549-50.

A similar result should obtain for Uniroyal. As explained above, a reasonable person in Uniroyal's position would not have expected retroactive liability for its having purchased the raw materials necessary for a contract partner to produce herbicide. Further, Uniroyal is no more responsible for the treatment or disposal of hazardous materials than any other purchaser of finished products whose raw materials include hazardous substances and whose demand is necessarily increased by the additional purchase.

In light of the foregoing, the Eighth Circuit's determination not to apply the tests announced in the *Eastern Enterprise* plurality and Justice Kennedy's concurrence was error; it raises a constitutional question of substantial importance, and merits this Court's review.

II

ACCORDING TO SOUND JURISPRUDENTIAL PRINCIPLES, THE *EASTERN ENTERPRISES* PLURALITY CONTAINS THE CONTROLLING RATIONALE

The Court should grant the petition also to clarify how to ascertain the holding of the Court where no opinion receives a majority of the Members' votes and where the rule announced in *Marks v. United States*, 430 U.S. 188 (1977), does not apply. Under *Marks*, where no opinion of the Court obtains a majority of the Justices' votes, the holding of the Court is expressed by

that opinion joined in by the Members who concurred in the judgment on the narrowest grounds, *see id.* at 193, provided that the opinion comprising the "narrowest grounds" is a logical subset of the remaining opinions agreeing with the Court's judgment. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). Assuming *arguendo* that neither the *Eastern Enterprises* plurality opinion nor Justice Kennedy's concurrence is a logical subset of the other, *see United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003), it nevertheless is true that the plurality opinion, representing the views of a majority of the Justices *within* the majority directing *Eastern Enterprises*'s holding of unconstitutionality, is the binding opinion on this Court.

First, the Court has referred to the *Eastern Enterprises* plurality as if it were binding. *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

Second, the United States Reports describes Justice Kennedy's opinion as "concurring in the judgment and dissenting in part." Often when Justice Kennedy disagrees with the reasoning of a principal opinion but agrees with its result, he will write a concurring opinion described as "concurring in the judgment" or "concurring in the result." *See, e.g.*, *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring in the judgment) (advancing a "significant nexus" test in place of the plurality's rationale); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (Kennedy, J., concurring in the judgment) (disagreeing with majority as to why federal courts have jurisdiction over challenges to detention of foreign nationals in Guantanamo); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring in the judgment) (emphasizing that Constitution guarantees right to impartial jury, not to jury composed of specific racial make-up).

And yet, both before and after *Eastern Enterprises*, where his opinions have been labeled as "concurring in part and dissenting in part," Justice Kennedy has concurred only partially with the reasoning of a *majority* opinion—in other words, an opinion that is indisputably binding. *See, e.g.*, *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003) (Kennedy, J., concurring in part and dissenting in part) (dissenting from a five-Justice majority); *Buckley v. Fitzsimmons*, 509 U.S. 259, 282 (1993) (Kennedy, J., concurring in part and dissenting in part) (dissenting from a five-Justice majority); *Saudi Arabia v. Nelson*, 507 U.S. 349, 370 (1993) (Kennedy, J., concurring in part and dissenting in part) (dissenting from a five-Justice majority).

Thus, the most natural inference from Justice Kennedy's *Eastern Enterprises* concurrence is that he considered at least part of the plurality opinion to be incorrect yet nevertheless binding. For, to describe any portion of an opinion as "dissenting" makes sense only if that portion of the opinion disagrees with a point that is *held* by the Court, *i.e.*, binding. Presumably, the portion of the plurality opinion from which Justice Kennedy "dissented" is the former's takings analysis. *See Eastern Enterps.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part) ("I . . . disagree with the plurality's Takings Clause analysis . . . ."). Thus, Justice Kennedy's concurrence, because labeled as partly dissenting, confirms that even he viewed the plurality opinion as in some respects binding.

Third, the rule encourages those Justices who might otherwise depart from the common reasoning of their colleagues to attempt to reconcile their positions or, at the very least, choose to remain silent, and thus foster certainty and

promote settlement of expectations,[4] while avoiding the functional equivalent of *seriatim* opinions. *Cf.* Henry S. Manley, *Nonpareil Among Judges*, 34 Cornell L.Q. 50 (1948) (suggesting that modern Court's practice of issuing numerous concurrences and dissents marks a return to the *seriatim* practice of the pre-Marshall Court).

For these reasons, in cases where the *Marks* rule is inapplicable, it is proper for the Court to look to the plurality opinion for the binding rule of law. Under that theory, the Eighth Circuit was compelled to apply the three-factor test set forth in Justice O'Connor's opinion. The appellate court's failure to do so raises jurisprudential questions of large magnitude, meriting this Court's review.

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[4] *See* William A. Bowen, *Dissenting Opinions*, 17 Green Bag 690, 693 (1905) ("The first duty of judges is, therefore, to render more exact that science of which they are the chief professors; and in so far as they discourage its slow and painful progress to that end, they undermine the foundations of its authority and menace the security of the people.").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Uniroyal should be granted.

DATED: March, 2007.

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